

CLINICAL NEGLIGENCE UPDATE

Co-ordinator of the Group, Stephanie Code and Secretary, Stephanie Forman of Irwin Mitchell. SF unable to attend, therefore Verity Danziger of Kingsley Napley has stepped in.

Clin Neg Special Interest Group has had meetings on the following topics in the last 12 months:

Plastic surgery with James Partridge, the Chief Executive of the charity, Changing Faces and Peter Chapman, Plastic Surgeon

Anaesthesia relating to obstetric care, Professor Ian Russell, Obstetrician and Mark Waterstone, Anaesthetist

A talk by the Chair of the NHSLA, Dame Joan Higgins dealing with the NHSLA and patient safety which we held in London and Manchester

Unfortunately our meeting set for last week had to be postponed because of the tube strike but we will reconvene and it is on brain injury described as "Finding and using abilities within brain injury" and will be by a Clinical Psychologist working at the Royal Hospital for Neurodisability and her colleague, Speech and Language Therapist with particular interest in communication aids.

Our next meeting is on Thursday, 16 July 2009 which will be an inquest update including Human Rights Act claims and costs "after the decisions in Savage, Smith and Roach". The barristers presenting are from 7 Bedford Row, Peter Ellis and Adam Weitzman. We will also have a representative attending from the Legal Services Commission dealing with costs at inquest.

We are always happy to consider other topics or interesting speakers and can invite them along. We aim to have two further meetings in the autumn.

Introduction

In previous years, there have been quite a few procedural issues to cover and "hot topics". This year is different. Major issues in relation to periodical payment orders in indexation (Thompson) have resolved and some of the contentious issues between parties have settled down, for instance Local Authority recoupment.

Having said that, there is a significant report which may bode the start of a period of massive change and we will go through some of the points raised by Sir Rupert Jackson.

We have also decided to mention some recent cases you will be familiar with to discuss our experience and any change in tactics by Defendants.

Case reports – see separate presentation by Verity Danziger

Jackson

The report is described as following on from the "great success of the Woolf Reforms". Its concern is the rising cost of litigation. Phase I is between May and 31 July 2009.

Fundamental questions in Chapter 2 of the report are set out:

- (i) Cost shifting
- (ii) Extending fixed costs
- (iii) Whether damages for personal injury are sacrosanct
- (iv) Whether it is necessary to limit costs of heavy litigation even though they are proportionate
- (v) Recovery of success fees and ATE premiums
- (vi) The possibility of changes to cost assessments (both detailed and summary)

The theme is that litigation costs should be:

- Within the means of the parties
- Encourage reasonable litigation behaviour

(Parts 2 and 3)

There are lots of statistics in the report and Sir Jackson states "It is striking how many meritorious claims are not settled until proceedings".

It would seem obvious to claimant solicitors that this is often caused by the delays by Defendants in making admissions but Jackson puts weight in the Defendant's position that:

- They have much less time to investigate
- Proceedings are issued prematurely

(Parts 4 and 5)

He discusses the different methods of funding:

- He is not keen on CFAs and ATEs
- He is keen on BTE (provided there is a by in or by or)

(Part 6)

RJ is interested in one way cost shiftings stating that this would benefit the defendant i.e. at present if a Defendant is successful they get costs on a standard basis and if not successful they pay the costs and success fees and premiums - "the Defendant would be better off in one way cost shifting".

There is a whole section on calculating general damages which will be covered by the next speaker. This would not seem to be a particularly expensive area of litigation.

The fundamental and key concerns in relation to funding and costs have been considered by the APIL Executive and their report will follow.

Other procedural points are considered, with the objective of reducing costs:

- (a) Witness statements are criticised because they “rack up” costs. It is suggested the Courts need to scrutinise to find out if:
- (i) Drafting is disproportionate
 - (ii) Repetitious
 - (iii) Inappropriate in providing irrelevant information

The options are cost sanctions and wasted costs orders, Judges settling list of issues in advance, witness summaries or stipulating the maximum length by word count. There appears to be a serious desire to make changes in this area.

- (b) Expert evidence. RJ thinks experts’ meetings are good, although acknowledges that there is a mixed response from solicitors. There are questions on when reports should be obtained and if Claimants should be stopped from instructing their experts before Court involvement. He suggests:
- (i) Sequential exchange of expert evidence on liability.
 - (ii) A presumption that quantum experts will be a single joint expert.

There is also reference to “hot tubs”.

- (c) Case management. The timescale is a significant issue and RJ has had many complaints that timetables are not followed and Courts do not enforce. Whilst both parties would argue enforcement orders are often sought they are very rarely given by the Judges. Changes considered are that:
- (i) All deadlines would carry a specified sanction
 - (ii) If one party is ready to exchange reports and the other is not the first would lodge their report with the Court and the second would have to apply for an extension of time
 - (iii) “The draconian option” – to declare a change of judicial policy from a certain date and non compliance with deadlines or due dates would no longer be tolerated, save in exceptional circumstances, There would be a serious of “hard cases” in January 2010 where parties would be struck out or unable to rely on evidence”

Conclusion

It is very important to keep up to date with developments following the preliminary report and we will aim to do this in the Clinical Negligence SIG Group. Legal Representatives need to be prepared as significant changes may happen in the very near future.

Stephanie Code
Partner, Kingsley Napley LLP